United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 17 1958
Joseph W. Stewart
CLERK

No. 14,509

TROYIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14,510 608

TRAVIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

Comes now the appellee by its attorney, the United States Attorney, and moves the Court to permit rehearing before the Court *en banc*. In reaching a result which has direct effect on jurisdiction in all criminal cases, a majority of a division of this Court has:

1. Ruled without supporting precedent;
2. Overruled a different, unanimous, division of the Court on the same issue in this same case;
3. Ruled in direct conflict with other decisions of this Court;

4. Ruled in direct conflict with decisions of the Supreme Court and other Circuit Courts of Appeals; and,
5. Ruled contrary with the explicit provisions of the Federal Rules of Criminal Procedure, which clearly enacted definite Congressional policy.

For these reasons, it is respectfully submitted that the issue summarized below is appropriate for consideration by the full Court.[1]

Federal Rule of Criminal Procedure 37 (a)(2) provides, in pertinent part:

> "*Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion."

Rule 45 provides:

> "*Time*
>
> (a) *Computation* . . . . .
> (b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

Throughout all the proceedings in the instant case appellants were each represented by retained counsel. Ap-

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[1] The Court has been granted power to order rehearings *en banc* "and the discretion for its exercise." 28 U.S.C. § 46 (c) (1952); Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 259 (1953).

pellants were convicted of manslaughter; sentences were orally pronounced on May 2, 1958; and, the judgment and commitment papers were filed on May 7th. Twenty-one (21) days later, on May 28th, appellants applied to the District Court for leave to proceed on appeal in forma pauperis; leave was granted; and, notices of appeal were filed by their counsel that same day; which was eleven (11) days after expiration of the ten-day period designated by Rule 37(a).

The following day, May 29th, appellants' counsel filed in this Court of Appeals a petition for "leave to appeal, time for notice of appeal having expired," a petition for leave to prosecute an appeal in forma pauperis, and a motion for leave to file an adavit. Therein, counsel in Appeal No. 14,510 stated: "I neglected to differentiate the rules as to appealing this type of case and that of a civil case." In addition, this counsel and also the appellant, *pro se* (in the aforementioned affidavit) stated that each thought the other would file a timely notice of appeal with the Clerk of the District Court. On June 19th, it was[2] (Misc. No. 1030):

> "ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis be and it is hereby, dismissed as moot and that the motion for leave to file an affidavit and the motion for leave to appeal, time having expired, be, and they are hereby, dismissed."

Thereafter, the appellee moved to dismiss the appeal. It is the ruling[3] on appellee's motion to dismiss which gives occasion for the instant petition.

By printed opinion published October 2, 1958, the majority of the division of the Court ruled the out-of-time noting of the appeal could be overcome if the delay was

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[2] Edgerton, Chief Judge, Madden, Judge of the Court of Claims, sitting by designation, and Fahy, Circuit Judge.

[3] Bazelon and Burger, Circuit Judges; Wilbur K. Miller, Circuit Judge, dissenting.

shown to have been caused by "excusable neglect."[4] It held (slip opinion, p. 2):

> "The rule [45(b)] . . . states the provision the Government relies on here, namely, that the court may not enlarge . . . the period for taking an appeal. This injunction upon the District Court applies to *enlargement of time,* the first of the two causes permitted by the rule. But it does not apply to the second alternative. In other words, the District Court has no authority to grant a greater period than ten days for taking an appeal. It may, however, if satisfied that the failure to note an appeal within ten days is excusable, permit late filing."

No precedent is cited or to be found in support of this interpretation. The holding is contrary to the specific language of the Rule, and is contrary to undeviating judicial precedent.

All federal courts have established the principle that a timely notice of appeal is mandatory and jurisdictional; that the time may not be enlarged by waiver or order of court; and that the right of appeal is lost if notice of appeal is not filed within the time prescribed by the Rules. *United States* v. *Isabella,* 251 F. 2d 223 (2nd Cir. 1958); *Banks* v. *United States,* 240 F. 2d 302 (9th Cir. 1957); *Wagner* v. *United States,* 220 F. 2d 513 (4th Cir. 1955); *Brant* v. *United States,* 210 F. 2d 470 (5th Cir. 1954); *Swihart* v. *United States,* 169 F. 2d 808 (10th Cir. 1948); *United States* v. *Bloom,* 164 F. 2d 556 (2nd Cir. 1947), *cert. denied,* 333 U. S. 857 (1948); *Marion* v. *United States,* 171 F. 2d 185 (9th Cir. 1948), *cert. denied,* 337 U. S. 944 (1949); *United States* v. *Froehlich,* 166 F. 2d 84 (2nd Cir. 1948); *United States* v. *Infusino,* 131 F. 2d 617 (7th Cir. 1942). This Court has consistently adhered to that well-established rule. See *Kirksey* v. *United States,* 94 U. S. App. D.C. 394, 219 F. 2d 499 (1954); *Richards* v. *United States,* 89 U. S. App. D.C. 354, 192 F. 2d 602 (1951),

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[4] The same day orders were entered remanding these two appeals, and the appeal of Blakeney v. United States, No. 14,568, to the District Court for a finding on the issue of excusable neglect.

cert. denied, 342 U. S. 946 (1952), *reh. denied,* 343 U. S. 921 (1952); See also *McAffee* v. *United States,* —— U. S. App. D.C. ——, No. 14,514 (decided by order dated August 8, 1958); *Bradley* v. *Pace,* 87 U. S. App. D.C. 11, 183 F. 2d 806 (1950).

As was said in *Huff* v. *United States,* 192 F. 2d 911, 913, 914 (5th Cir. 1951), *cert. denied,* 342 U. S. 946 (1952):

> "Appellate jurisdiction in the federal courts is purely statutory and there is no right to appeal save as it is granted by statute or a rule of court, which is authorized by Congress and has the force of law. The purpose of rules limiting the time within which an appeal may be taken is to force an early termination of criminal cases. . . . They are *designed to fix a definite, ascertainable point in time when litigation shall be at an end* unless an appeal has been taken within the time prescribed" (Emphasis supplied).

All courts use "definite and ascertainable" as the essence of the enacted Congressional policy.

In its opinion here, the majority said with regard to the provision ". . . the court may not enlarge . . . the period for taking an appeal,

> "This injunction upon the District Court applies to *enlargement of time,* the first of the two causes permitted by the rule. But it does not apply to the second alternative."

Since clause two permits "the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect;", the majority's ruling, it is submitted, has nullified the limiting provision of the Rule. The implication of this can be seen by noting the complete limiting provision which reads as follows:

> ". . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

The majority's holding thus permits on a mere showing ing of excusable neglect, *at any time* after the specified

period a new trial (Rule 33), an arrest of judgment (Rule 34), and the correction or reduction of sentence (Rule 35), as well as an appeal, all of which would be contrary to the Rules.

The Supreme Court has specifically ruled to the contrary as to Rule 33, which applies to motions for new trial. *United States* v. *Smith,* 331 U. S. 469 (1947), *reh. denied,* 332 U. S. 784 (1947).[5] It said in the *Smith* case (f.n. 2):

> "The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed. The policy of the Rules was not to extend power indefinitely but to confine it within constant time periods."

Contrary to the Supreme Court, the decision in the instant case would permit such enlargement as to motions for new trial under Rule 33.

The Court's attention is respectfully directed to the case of *United States* v. *Isabella, supra,* wherein the facts were practically identical to the case at bar. There the notice of appeal was only two days late and the ". . . late filing of the notice was due to the oversight or neglect of the attorney whom Isabella retained to prosecute his appeal,[6] or someone to whom his attorney delegated the task of the timely filing of the notice." Judge Medina wrote for the court as follows (pp. 225, 226):

> "It has long been settled law that where a notice of appeal is filed too late no conduct thereafter on the part of the appellee can constitute a waiver or give the appellate court competence to hear and determine the alleged appeal. The timely service of the notice of appeal is the sole legal basis for the authority of the appellate court to proceed.
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[5] See also Bruno v. United States, 86 U.S. App. D.C. 718, 180 F.2d 393 (1950); Marion v. United States, supra; Drown v. United States, 198 F.2d 999 (9th Cir. 1952), cert. denied, 344 U.S. 920 (1953).

[6] This is the reason offered by appellants' counsel here.

"True it is that Isabella's attorney on the day of sentence stated in open court that he would appeal. But we cannot say that an oral notice of appeal is a compliance with a rule requiring the filing in the office of the Clerk of the District Court of a 'notice of appeal' and setting forth with particularity the matters required to be stated in such 'notice of appeal.' Hard cases make bad law and such a ruling would indeed open a Pandora's box.

That there was mistake, inadvertence, neglect or something of the sort here is plain enough and if there were in the pertinent rules some general provision authorizing a court to grant relief we might well be disposed to grant such relief here. The difficulty is that the pattern of the Rules of Civil Procedure and the Rules of Criminal Procedure relative to appeals makes it clear that relief may be granted only in a specified case. The text of the rules is too explicit to leave room for construction to meet the facts of a variety of particular cases of real or seeming hardship. Thus Rule 73 of the Rules of Civil Procedure, 28 U.S.C. indicates that the times for taking appeals therein enumerated are absolute, 'except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.' And it is not without significance that no provision whatever is made for 'excusable neglect' or any other kind of neglect, mistake or inadvertence in Rule 37 of the Rules of Criminal Procedure. Where a person convicted has an attorney the notice of appeal must be filed within ten days as above noted. * * * Accordingly we must grant the Government's motion to dismiss the appeal." [7]

This Court in other cases, and on this issue in this very case, has itself so held.

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[7] See also Dennis v. United States, 177 F.2d 195 (4th Cir. 1949), where the court said, ". . . failure to appeal may not be excused upon a mere showing of neglect of counsel."

CONCLUSION

Wherefore, it is respectfully suggested that the Court's discretion would appropriately be exercised by the order of a rehearing *en banc*.

/s/ OLIVER GASCH
OLIVER GASCH,
United States Attorney.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

/s/ EDGAR T. BELLINGER
EDGAR T. BELLINGER,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

/s/ EDGAR T. BELLINGER
EDGAR T. BELLINGER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been mailed to attorney for appellants, I. Wm. Stempil, Esquire, 1117 Warner Building, Washington 4, D. C., this — day of October, 1958.

/s/ EDGAR T. BELLINGER
EDGAR T. BELLINGER,
Assistant United States Attorney.

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APPELLANT' BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED AUG 25 1958
Joseph W. Stewart
CLERK

No. 14,510

TRAVIT ROBINSON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

608

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I. WILLIAM STEMPIL
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14, 510

Irwit Robinson

Appellant

vs.

The United States of America

Appellee

AN APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

I. WILLIAM STEMPIL
ATTORNEY AND COUNSELLOR AT LAW
WASHINGTON

APPELLANT'S STATEMENT OF THE QUESTIONS PRESENTED.

1.- The first question presented is whether there was sufficient evidence of Appellant's guilty on the date and time of his alleged offense to sustain his conviction in this case.

2.- The second question presented is whether the instructions of the trial court on immunity were so wrong and abstract as to constitute reversible error.

3.- The third question presented is whether certain statements made by the Government Prosecutor during the opening and closing statements and during the trial constitute reversible error.

4.- The fourth question presented is whether the appellant was deprived of his rights under Rule 5(b) of the Federal Rules of Civil Procedure.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

CIRCUIT

NO._____

TRAVIT ROBINSON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case is an appeal from the Judgment of Conviction under an indictment charging Travit Robinson with violation of a section of the D.C. Code pertaining to Homicide (Second Degree Murder)_____Sec. of the D.C. Code, 1951 Ed. as Amended.

The appellant proceeded under an order to permit him to appeal in forma pauperis singed by the Trial Judge .

Jurisdiction is conferred upon this Court by 28 U.S. Code 1291.

I. WILLIAM STEMPIL
ATTORNEY AND COUNSELLOR AT LAW
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ARGUMENT:

I. The evidence of Appellant's Sanity On The Date of His Alleged Offense Was Not Sufficient To Sustain His Conviction.

II.- The Instruction Of The Trial Court On The Subject of Insanity Were So Wrong and Abstract As to Constitute Reversible Error.

III. The Conviction In This Case Must Be Reversed because of Prejudicial Remarks Made By The Prosecutor During The Trial and During His Opening Statement Constitute Reversible Error.

IV. The Interference of The Trial Judge During The Trial With Improper Questions Asked Of the Witnesses Constitute Reversible Error Because It Influenced the Jury Against the Appellant.

V. The Appellant Was Denied Due Process Under Rule 5(b) Of The Federal Rules of Criminal Procedure.

CONCLUSION..... 4

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STATEMENT OF THE CASE

The main defenses relied upon by the defendant Travit Robinson were self-defense and insanity at the time the alleged offense was committed.

Travit Robinson produced witnesses, Henry Blakeney , his wife Rosa Robinson, his brother Treyit Robinson, Dr. Moses Agnson , Jr. and Dr. Elmer Klein who testified as to his insanity at the time of the alleged offense charged with, and all were in agreement that his actions were not those of a normal person and the medical testimony indicated that at the time of the alleged offense, Travit Robinson was temporarily insane and not responsible for what he did after being struck several times first by the deceased Walter Smith.

Travit Robinson , Henry Blakeney , Treyit Robinson , and the Government's star witness Robert Lee Evans (who changed his testimony at the trial from that which he gave at the Coroner's Inquest) testified that Travit Robinson was acting in self-defense when he struck back at Walter Smith the decedent.

The Government's proof as to Travit Robinson's sanity consisted of the testimony given by Detective Sergeant Donahue during the time that he questioned the appellant at Police Headquarters a few hours after the alleged crime for one and one-half hours.

No expert testimony in the form of any medical examination or doctor's testimony was offered by the government to rebut the appellant's claim of insanity at the time of the alleged crime.

The request for a directed verdict at the end of all of the testimony was denied and the judge instructed the jury which in turn returned a verdict of manslaughter against the appellant.

The appellant was remanded to D.C. Jail to await the report of the Probation Officer, sentenced to a term of four to twelve

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years and is now confined to the Reformatory at Lorton, Virginia.

STATUTES INVOLVED

D.C. Code, 1951 ed. as amended Title 24 Sec. 301-as further amended on Aug 9, 1955, 69 Stat. U.S. 609, ch 673, sec. 1.- and interpreted by this Court in Jordan v U.S., and U.S. v Jordan, (1953, 109 F. Supp. 528, affirmed 93 U.S. App. D.C. 65, 207 F. 2d 28) Inconsistency Between Statutes. Insofar as there is a repugnancy or inconsistency between section of D.C. Code relating to procedure for determining whether an accused is mentally competent to stand trial, and federal statute relating to such procedure, the federal statute prevailed since it is a later enactment and was intended to cover the subject matter comprehensively. (cited in the Jordan case, supra.)

Sec. 4244 of the United States Code .....:" * * *....

No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted into evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. (Sept 7, 1949, c. 535 sec. 1, 63 Stat. 686.)"

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I. WILLIAM STEMPIL
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STATEMENT OF POINTS

1:- The Court below erred in failing to enter a judgment of acquittal on the ground that the evidence of appellant's sanity on the date of the alleged offense was not sufficient to sustain a conviction.

2:- The Court below erred in instructing the jury on the defense of insanity in that its instruction was so wrong and abstract to such a degree that it constitutes reversible error.

3:- The Court below erred in not declaring a mistrial on account of the improper remarks made by the Government prosecutor during his opening statement and during the trial , said remarks being made, without any foundation , as to events that did not take place and remarks made as to the competency of defense witnesses, solely for the purpose of inflaming the jury beyond any evidence presented.

4:- The Court below erred in refusing to hear the defense on the violation of appellant's rights under Sec. 5 (b) of the Federal Rules of Criminal Procedure.

SUMMARY OF ARGUMENT

The defense in this case was self-defense and insanity.

It must be conceded that the appellant Travit Robinson introduced proper evidence of insanity---therefore leaving the Government no alternative but to prove beyond a reasonable doubt either that the appellant was not suffering from any mental disease or defect at the time the alleged offense took place or in the alternative--that such offense was not the product of any mental disease or defect. This was a burden imposed upon the Government, but the record indicates that it did not introduce any direct evidence of sanity whatsoever in this case.

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In the Government's case against Travit Robinson, it relied entirely upon the nature of the crime, the appellant's conduct when questioned and his subsequent "confession" alluded to by the Government prosecutor to discharge its burden of proof.

In other words, the Government contended that evidence of being able to talk coherently a few hours after the alleged offense took place to a police officer at police headquarters and have that police officer state in his opinion the man was sane, is sufficient to establish sanity beyond a reasonable doubt.

The Government further relied upon a witness, Robert Lee Evans who discredited himself on the stand when he changed his testimony at the time of the trial from that which he gave at the Coroner's Inquest.

The trial took place beginning March 25, 1958, Robert Lee Evans testifying on March 26, 1958, and the Coroner's Inquest took place on December 16, 1957.

The testimony of the Police Officer, Sergeant Donahoe revealed that in his examination of the appellant which began at 6:40 a.m., less than 5 hours after the alleged offense took place, that ...

(R. 525)-A- Well apparently he by the answer of his question, he didn't recall right at that particular moment, there were two questions or so after that he then said to me I will tell you what it was or words to that effect, from now on I want to tell you what happened.".....

Q-What did you observe as to his condition.

A.- He appeared to me as I said, he had blood shot eyes. He appeared after he had been trusted but it was evident that he had been in a fight. I noticed this blood up in there and his responses were the type you didn't have to push him into. I just sat there and waited for him until he was ready to answer my questions which I put to him.

Q.- Did he answer them with difficulty or did he have any trouble in answering them or did he take his time after you asked him a question ?

A.- I wouldn't say it was rapid, firing questions and answers. The only way I could reply to that is that it was in a normal way you would answer a question presented to you.

Q.- The questioning started at 6:40 and ended at 8:10, that is a one and one-half hours.

A.- That is right.

Q.- Did you notice how long it took the District Attorney to read the whole statement ?

A.- No, I didn't notice how long.

Q.- It didn't take as long as one and one-half hours, did it ?

A.- No, that more or less depends upon the typist and I am not the best and as a general rule I have some other duties that take me away from it but that is more or less dependent upon the typing and how responsive a defendant you have and that is a two page statement which I could guesshhhh possibly do it a little faster.

Q.- Why would it take you a little longer?

A.- I haven't any idea, I just typed at the speed I was capable of typing at that time.

Q.- Are you an expert at determining the mental condition of someone when you bring them in for questioning ?

A.-No, sir.

Q.- Now I don't recall, did the District Attorney ask you if he was of sound mind when you started this questioning ?

A.- In my opinion he was. (underlining by appellant for emphasis.)

Q.- Do you know ? Can you give me the definition of sound mind and unsound mind.

A.- It is something I think relative to all of us.

.....

THE COURT:- Do you know what it means to be of sound or unsound mind ?

THE WITNESS:- Yes, sir.

THE COURT:- What is it ?

THE WITNESS:- They have actually no control of their mental faculties, do things out of the ordinary that the normal person doesn't do.

BY MR. STEMPIL:- That is a person of unsound mind ?

A.- That is correct.

..... (R 528)

Q:- In it your opinion that a person who is sitting as quiet as he was, could he have been of unsound mind at the time the questioning by you was taking place ?

A.- In their response to questions, ordinary questions placed if he had been of unsound mind there would have been something very peculiar about it and I think I would have stopped questioning this man if my opinion were that he was of unsound mind.

Q.- Didn't you stop questioning him ?

A.- Didn't I stop? If you are referring to him, I was taking his statement and eventually there came a time when I concluded the statement at 8:10 or whenever it was.

Q.- Didn't you stop, or didn't you say you did stop questioning him in order to bring Hickmany over to him to help refresh his memory on points uncontradictory to what Hickmany had told you ?

A.- There came a time when I brought Hickmany over but not for the purpose of determining whether he was of sound or unsound mind at all.

Q.- You didn't know he was of sound or unsound mind at that time ?

A.- In my opinion he was of sound mind at that time.

.....(R-529)

Q.- And you are qualified to determine whether he was or was not ?

A.- That is only my opinion. (Underlined by appellant for emphasis.)

After a few more questions asked of Sergeant Donahue, the defense approached the bench as stated:

(R-537)
(R-538) - Your Honor, we would like to make a motion for a directed verdict on the grounds.....

THE COURT:- Are you serious ?

MR. STEMPIL:- I am serious, your Honor.

THE COURT: DENIED, Is there anything else ?

MR. STEMPIL:- ....That the psychiatry expert testimony shows he was definitely of unsound mind at the time the crime was committed.

THE COURT:- Anything else ?

MR. STEMPIL:- That is it and this exception.

At this point, the Court erred.

The Government had offered no expert testimony as to the sanity of Durvit Robinson at any time, either before, during or after the alleged offense except testimony of a police officer who, in his own opinion, thought the defendant was of sound mind.

At this point the Court should have granted the motion for a directed verdict of acquittal on the grounds of insanity and that the Government had not borne the burden of proving that the defendant, beyond a reasonable doubt , was sane at the time the alleged offense took place or in the alternative that the offense was not the result of a mental defect or disease.

The authorities are unanimous that this kind of evidence given by Officer Donahue is utterly insufficient to establish the absence of mental disease.

Even under the diversified right from wrong test, it has been frequently recognized that a man who can premeditate and plan, speak coherently and remember the past may be grossly psychotic and clearly insane in the eyes of the law. Under the Durham rule, this means of debasing sanity as differentiated from insanity was adopted for the express purpose of giving greater recognition to mental disorders manifesting themselves primarily in the emotive or affective sphere. This rule will inevitably be reduced to a sham and travesty if the Government can satisfy its burden thereunder by showing that some of the defendant's intellectual faculties appear unimpaired on the date of the offense in question.

Dr. Elmer Klein, M.D., and a psychiatrist of 33 years experience testified that he examined the defendant at the D.C. Jail on March 18, 1958 between the hours of 7 and 9 P.M. (R-432) and that as a result of the examination, mental and physical, which took at least one and one-half hours (R-433 et seq) he found:

1:- I found the man was mentally sound as of the time I examined him and I found also he was of sound mind.

2:- He had no psychiatry disorders prior to the episode in which he suffered traumatic psychosis of a brief duration.

3:-No mental disorder prior to the time of the alleged crime or altercation, nor since, but that there was a period of amnesia for about three or four hours, probably during the period of the altercation and shortly after he was injured by being struck on the head.

4:- That Everit Robinson suffered two blows, one which dazed him but did not cause the amnesia because he was able to recall some of the events that (R-434) transpired between the first blow and then what is commonly referred to as having blacked out but he does recall there were two blows, the first one made him somewhat dazed and the second blow for after which he had no recollection other than having received the blow and

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them subsequently for which he had complete amnesia.

The Court asked Dr. Klein if he classified amnesia as insanity and the Doctor stated:

"It is often a part of a mental disorder.

THE COURT:- I mean in this case, do you have any opinion from what you know ? You say he suffered a bad case of amnesia for three or four hours ?

THE WITNESS: Yes, sir.

THE COURT:- Do you have any medical opinion as to whether or not this man was of unsound mind ?

THE WITNESS:- Yes, I do.

THE COURT: What is it ?

THE WITNESS:- I think he was of unsound mind during that period of three or four hours.

Mr. Stempil asked the doctor to repeat what he had answered because he didn't hear what the answers were, and the Court admonished him with.....

THE COURT:- How do you know, you said you didn't hear him, so how do you know what the answers to my questions were ?

(R-455)- MR. STEMPIL:- I heard your questions but I didn't hear all the answers.

THE COURT:- He said he had an opinion that Truvit Robinson was of unsound mind for the three or four hour period that he suffered from the amnesia. You are not going to go over it.

Further questioning of the doctor revealed that Truvit Robinson's head showed severe scarring on the left temporal side and two x scars, on the top of the head and the left side of the head.

(R-456) Q-Doctor, those injuries, that you have seen, would such injuries, if he received the blows you stated he did get there and he was still conscious, what is the usual condition of a person after they receive those blows ?

A.- The usual condition would be one of being dazed, possibly somewhat dazed, and the person in that sort of condition might be going through certain automatic movements, certain movements

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which may seem perfectly natural to a normal person's observations, but actually the individual himself, who suffered that injury is not at all himself. He may not remember it later when you ask him about some of the actions through which he went. He is in a state of automatism, very much the same way as a pugilist or a prize fighter and may go through the entire fight with his opponent and yet remember nothing of what had transpired during the period of fighting.

(R-457)- Q-How soon do these symptoms appear after a man gets hit.

A.- It can appear immediately, it usually does appear immediately right after the injuries suffered or blows are made.

Q.- What is the symptoms displayed other than these automatic movements that you have described ?

A.- There don't need to be any movements; he may go through the same activity that he would ordinarily go through under the same circumstances. As I said it might not be conspicuous at all to an outside observer that the man is any different than under normal conditions.

Q.- Could a man drive a car under those conditions ?

A.- I would say yes. We did not go into that but in the practice of psychiatry you will find individuals who have suffered amnesia, who go through complicated, various complicated procedures and behaviors of carrying on their lives and responsibilities without having any recollection before of what had transpired during the that period.

The doctor was asked to comment on the fact that the doctor at Community hospital stated that Travis Robinson's conduct was such that he was making light of what was going on that he didn't take into consideration the serious wars of his wounds. Dr. Klein's answer was

(R-458)

A.- I suppose it is indicative of the fact that he didn't take in the
full import an seriousness of the situation through which he had just been.

Q.- What was that caused by ?

A. Now that you mentioned the fact or asked me if the man was able to to drive the car and I said he could, that an individual could drive a car home, but as a matter of fact, from what I gathered from the patient that was not as it was, he was there with another man who was directing him in driving the car home, a home to which he had driven the car, to get there, indicating the man was not himself, he was somewhat dazed, still he was having some psychiatry effect from this blow and from the amnesia period through which he had been going.

Q.- Doctor, (R-459)-there are witnesses not only for the Government but the defendants themselves, admit it was a junk, be it the same junk or not, or looks like it, that was first used to hit Everit Robinson on the head and inflict those blows that you saw there and then somehow Everit Robinson secured that bumper jack from Walter Smith and started swinging and during that time he was swinging, the witnesses indicated and testified that he struck Walter Smith, not one blow, but several blows and no one determined how many blows were actually struck. There was testimony that he not only struck at Smith but attempted to strike his own brother during that time. Can you indicate, from what you are holding in your hand, if that type of weapon would create the condition that you say was created as a result of that blow or blows to Everit Robinson's head ?

A.- I can say that this jack is certainly heavy enough to create a blow to cause amnesia in a person or suffer an injury which would result in amnesia.

The doctor further testified that with that amnesia condition, that condition would cause a degeneration or damage to the nerve cells of the brain causing some type of condition that would make it impossible for Travit Robinson to physically, mentally and medically to know what he was doing the moment after he was struck on the head with the jack.

(R-460)-The doctor continued that certainly chemically we do know that a severe blow to the skull on an individual can produce amnesia period lasting for several hours or longer.

In response to the question of what his opinion was as to the condition of Travit Robinson's mind after being struck the first and second blows, the doctor answered:

"In my opinion of his mind of that period is that he did not know what he was doing in the sense in which a person is knowing what he is doing in his conscious normal status. He was suffering from an episode of amnesia and in the regular (R-461) sense of the word he was losing his mind at that period and he didn't know right from wrong; he did not know what he was doing at that time."

Q.- When you say of unsound mind, what do you mean ?

A.- I say he had traumatic psychosis during that period of three or four hours.

Q.- Traumatic psychosis, interpret that, please ?

A.- In regular language I suppose you can interpret that as traumatic insanity for that period.

The Prosecutor took over the examination and was told that Dr. Klein examined the plaint for at least an hour and a half, and that (462) he gave Travit Robinson a psychopathic examination of testing his reflexes and his responses to various psychopathic tests. The prosecutor then attempted and did elicite from Dr. Klein his recollection of what Travit Robinson told him about the altercation and what led up to it (R-464-465)

then the prosecutor pressed Dr. Klein as to final details of what he learned about the fight (465)-.....that the girl was on the ground with Smith over her with a knife, threatening to cut her throat, and that before they went back because Smith was in such a disturbed and dangerous and threatening condition, they took some instrument of defense with them, I suppose this jack and lug wrench to protect themselves. When they got there, I think, he told me that Smith first attacked his brother, Travit Robinson's brother, knocked him down and he (R-465) was dazed and as he got up he noticed his brother was on the ground, he didn't know at the time but he found later he was bleeding where he cut him with the knife and recalls being, getting up being somewhat dazed and recalls having hit Smith on the shoulder with the lug wrench.

Q- He recalls having hit Smith ?

A.- Yes, and then after that Smith came towards him again as he was getting up and right after he hit Smith with the lug wrench he was unconscious and that is the last thing he recalls. He did not recall any other incidents until he woke up at the police station the next morning.

Questioned as to whether he said that his mind blanked out after he got hit the second time, Dr. Klein answered the prosecutor thusly:

" From that point on he said he didn't recall anything; he didn't say so in so many words because I avoided asking any direct question which would give him the opportunity to remember from this point on but as he told his story I would ask certain questions as to what happened then in an indirect way so he would not be aware of what my point was in trying to determine the amnesia but definitely there was that period of amnesia when he couldn't recall anything, he didn't recall after he was struck nor driving home, nor the way his wife got him to go to the hospital.

(R-467)

Questioned at length, not in appellant's opinion, as to what actually happened at the examination, but in any a most reprehensible manner attempting to discredit Dr. Klein's testimony, the prosecutor finally asked Dr. Klein,

"You have your entire opinion, don't you, primarily that is, on what the defendant Travit Robinson told you ?"

To which, Dr. Klein replied, "(R-468)

"No, I don;t think so. I base my opinion primarily on what I have seen in similar circumstances of this sort, on what we know of patients in a condition of this sort."

After being badgered as to how he arrived at his opinion, Dr. Klein again repeated:

" I said I relied primarily on my clinical judgment in such an instance, a traumatic amnesia or psychosis occurs when a person is severely enough injured on the head"

Q-And you base your opinion on that assumption on what he told you is true ?

A.- Not quite right because there is no question about his having a serious injury to his head by looking at the scars.

The badgeringcontinued with the sole purpose of belittling the doctor's testimony and his conclusions (R-469) in the eyes of the jury, a serious error which ought to be corrected here and now by a reversal of the conviction.

This Honorable Court need only to examine the transcript on page 470 through 477 to see that all that transpired then was an act on the part of the prosecutor with the Court joining in from time to time attempting to discredit everything the doctor testified to and to aggravate this illegal attempt to influence the jury the prosecutor deliberately inserts into the record a false statement, thusly:

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(R-477)- Q- If the defendant had told the police that he had been to a party, left the party, and then there came a time when he saw his brother and his friend tussling on the corner, that he went up to part them and then someone hit him with the junk, he made a break and ran back down the street and got into his car and drove off and went straight home and after he got him there his wife sent him to the hospital, what would that indicate to you, any recollection of what happened ?

(R-478)- Dr. Klein asked, //"---May I ask, is that what happened ? The prosecutor answered, ---"Yes, it is."

<u>This was a deliberate lie and a falsehood and no evidence or any testimony was ever given that the incident occurred in that way.</u>

Dr. Klein's response then was,....."I don't mean your reading it, did that actually transpire ? "

This was asked by the Doctor because evidently the Government prosecutor was making a show of reading from a document when in fact no document that the prosecutor may have had contained such a recital of facts.

Then the Court interrupted and said:

"He went home, saw his wife and went to the Hospital."

From this point on, the prosecutor again berates the doctor for his opinions and even leads him on into a false set of facts indicating that; the jury is going to determine the facts (R488) Q- (487) Q-the fact is he remembers walking over and hitting this man the first blow with a weapon, this is a proven fact, you would say, wouldn't you, he was of sound mind at that time ?

A.-Yes, he was.

<u>MR. STEMPIL:-Your Honor, there is no testimony to that.</u>

THE COURT: Just a minute. The question is whether or not he struck at him with a leg wrench before he got the first blow. He asked the question if he swung at him before he got hit on the head with the wrench.

The record indicates that certainly was not the question, and that the question asked of the doctor was for only one purpose to distort the facts because Dr. Klein answered it properly, but before he did, the Court again interfered as said:

" The question the jury has to determine is who struck the first blow. The question is a hypothetical one if the defendant struck the first blow before he was struck with the jack, the his mind was all right, Comment ?

THE COURT: If he did it prior to the time he got hit in the head with the jack ?

Q.- And he would be of sound mind (R-483)

A.- Certainly from the evidence he would be and I would be inclined to believe so. <u>However, I don't know that all the facts are accurate.</u>

MR. FLANNERY:- The jury is going to determine that, the facts.

Q.- Assuming it to be true, Travit Robinson went over and hit the first blow with the lug wrench before he was hit on the head with the jack, you would say at that time before he was hit that he was of sound mind ?

This type of a question if it was not used for the purpose of misleading the jury was the most improper one ever used in the trial and appellant insists that the prosecutor distorted a hypothetical question in such a manner that the jury was misled completely and failed to give the appellant a fair trial.

Dr. Klein countered Mr. Flannery's inflammatory statement with this answer:-"I would say so except for one minor modification, namely, that he told me he was struck by Smith on the temporal before he had done anything at all. I mean before Robinson hit smith. You see, there were two blows. He told me he was rather dazed at that time.

The Government again misled the jury by asking a trick question thusly:

(R-488)- Q.- He knew the difference between right and wrong and was of sound mind before he got hit on the head with the jack ?

A.- I would be inclined to think so.

Q.- And this is your opinion, isn't it ?

A.- Yes.

As a result of this misleading type of cross-examination, it became necessary for the defense to make a redirect examination of the doctor and the questions and answers follow:

(R-489) Q.- Doctor, you were asked a hypothetical question by the prosecutor as to whether or not Travit Robinson was of sound mind when he hit, would he know the difference between right and wrong when he struck Smith on the shoulder with the lug wrench before he got hot on the head and your opinion was that he could have been. Another hypothetical question, after Travit Robinson had been struck with a blow on the side of his head which the hospital makes a record of, a sufficiently heavy blow that it would be recorded in the hospital records that he was hit or suffered that type of blow and you were told by them that the man had suffered that type of blow before he struck the man with the bumper jack, and as a result of that blow, fell down, there he was hit could that have started a condition that could have gone further and then being struck on the head with the bumper jack cancel that cycle of events ?

The doctor answered, "I would say it is purely speculative from that he said awhile ago".(The appellant contends that the doctor was referring to the prosecutor's statements at this point.)

I didn't examine the man at the time (R-490) and from that he told me he said that he felt rather dazed when knocked down by this man before being struck with the wrench."

THE COURT:- He remembers what happened between the first and second blows ?

THE WITNESS:- Yes, he did. That his condition of consciousness or

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how dazed he was, it would be awfully difficult to say during that short period.

Mr. Stempil then recalled to the doctor that in his previous report made at the beginning of the direct examination he stated that Travit Robinson was struck three blows, one on the side of the head at about the time Smith cut both Troyit and Travit Robinson, then Travit struck at Smith with the lug wrench, and finally Smith struck Travit Robinson twice on the head with the bumper jack before Travit Robinson wrested the jack from Smith after fatally trying to protect himself and struck the blows that caused Smith's death.

The Court then attempted to mislead Dr. Klein again with this question:

THE COURT:- Didn't Smith hit him with the jack first ?

Dr. Klein:- After he recalled Smith having struck him ?

THE COURT:- That is all, two blows ? (R-491)

Dr. Klein:- That is all.

Yet, the Court had before it the cross examination made by the prosecutor who elicited this information from Dr. Klein, that (R-465)

Q- He definitely remembers being hit twice with the jack ?

A.- Not with the jack. I believe the first time, I am not sure of this, as I recall he said he was struck in the left temporal sufficiently severe to knock him down and he was dazed; whether or not he was struck with the lug wrench at that time at that time, I don't know. (The appellant presumes the doctor meant the bumper jack, not the lug wrench.)

Still The prosecution kept up this type of questioning knowing well that Dr. Agnew of Carnelly Hospital testified that he treated Travit Robinson (R-435) for lacerations on the frontal area, contusion and abrasion in the left temporal region. Contusion and abrasion so I ordered a skull x-ray for the morning. He had nine stitches, the wound was dressed and he was given a sedative and advised of the treatment he received there.

In spite of Dr. Agnnan's testimony and Dr. Klein's report of his examination of the defendant Truvit Robinson, the Government is allowed to rebut that testimony, after the motion for a directed verdict was denied, with the testimony of a police officer Sgt. Donahue who admits from the stand that his police work experience is a matter of six years and that in his opinion after questioning Truvit Robinson at police headquarters for an hour and a half he was of the opinion that the appellant was of sound mind. (R-527-528-529)

To quote Judge Fahy of this Honorable Court in Douglas v U.S ,-99 App. D.C. 232 at 234,

"The events unquestionably occurred substantially as above outlined. The contention on appeal is principally that evidence of the diseased mental condition of the accused requires us to hold that the trial judge(s) should have directed verdicts of acquittal on the ground of insanity. See Title 24, sec. 301, D.C. Code since amended by Pub. L No. 313, 84th Cong. 1st Sess. Aug. 9, 1955.

At page 235 of the same opinion, Judge Fahy continues:

" There was evidence * * * * that the accused was of unsound mind when the (robberies) occurred. The prosecution therefore was under the necessity of establishing to the satisfaction of the jury beyond a reasonable doubt that the (robberies) were not the result of Douglas' insanity."citing Davis v U.S.160 US 469, 16 S Ct 353, 40 L. Ed. 499. Continuing, Judge Fahy stated:- "There in the course of an exhaustive review, the Supreme Court held:

Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Giving to the prosecution , when the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question, from the time a plea of not guilty is entered, until the return of the verdict, is whether, upon all of the

evidence, by whatever side adduced guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. Id. 160 U.S. at pages 487-488, 16 S Ct. at page 358.

In Tatum v U.S. 88 App D.C. 386, 190 F 2d 612 and restating the matter within the rules prevailing in this jurisdiction since Durham v U.S. 94 App D.C. 228, 214 F 2d 862, 45 ALR 2d 1430,—— in order to justify a conviction the proof, considered with the presumption of sanity, must exclude beyond a reasonable doubt the hypothesis that the conduct indicted was the product of a diseased mind."

What more can Travit Robinson offer in his defense except to ask this Honorable Court to refer to the testimony of all of the witnesses and to note that each and every one of them makes a comment as to something irregular about his conduct.

Mahoney testified that although Travit Robinson drove his car home, he drove by Mahoney's direction and that Travit Robinson seemed to be in a daze and going in haphazard manner and direction. (R-246)——" When you left the scene of the fight, in the automobile driven by Travit, did you notice that you were being followed by another car ? A.- Yes, sir.
Q.- Did you inform Travit of that ?- A. Yes, sir.
Q.-What was his reaction ? A.- He didn't seem to understand or wasn't paying any attention.

Rosa Robinson, Travit's wife testified (R-420) that although she kept asking her husband to tell her what happened--"he wouldn't say anything"——(R-425)- No. He didn't act the same. For one thing he acted dazed, he acted strange, I don't know how he acted, I know his eyes look funny.* * * * I noticed he was opening his his eyes and closing them as if he was dazed or feeling something."
Q.- When you observed him being drunk on previous occasions did he do the same thing ?- A. No, no he didn't.

Dr. Klein and Dr. Sgroum told what they knew and observed and what they did to Truvit Robinson and Dr. Klein's testimony was the subject of being treated as though it were given by a layman without any knowledge of medicine and psychiatry, as far as the prosecution was concerned, despite the fact that Dr. Klein qualified as a physician with 33 years of experience.

In fact, his opinion was of prime importance in another case before this Court some time ago.

In the Bishop v. U.S. case, 96 App. D.C. 117, Dr. Klein's opinion after an examination of the appellant Bishop was most important in helping this Court come to the conclusion that

"Insanity at the time of commission of the crime is a defense to the indictment and that the issue of insanity is presentable upon trial and appealable if error has been made in respect to it."

With that testimony before it, when the Court allowed the case to continue and did in fact refuse the motion of the defense for a directed verdict on the ground that the government did not carry and prove its allegations as propounded in the Bozeman and Durham cases, supra, your appellant says that the trial court committed reversible error and that he is entitled to a reversal of his conviction and entitled to a judgment of acquittal.

The government may contend that Dr. Klein's examination took place three months after the alleged offense and that he absolutely could not arrive at the diagnosis and opinion that he did.

Well, why then did this Court take cognizance of the report made in the Bozeman case, supra, when it noted:

"Judge Laws ordered the doctors from St. Elizabeth's to examine the accused three months after the offense.

"They testified and concluded (on page 235 of the opinion) that Bozeman was of unsound mind, suffering from a psychosis, symptoms of which he described. He said that although it could

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not definitely be established how long the mental illness would take to vanish the state he found, he believed it went back as far as September..."(In this case, the examination was ordered in December.)

On Cross-Examination where the doctor was asked whether the disease or disorder he found in December caused the crime, he answered:-"It contributed largely to it, I would say by reason of the serious nature of the disease."

All of the above is cited from the Douglas case, the actual opinion of this Court.

The nub of this entire question as to whether or not the Government has fulfilled its obligation in Travit Robinson's case is spelled out very carefully by this Honorable Court on page 237 of the Douglas opinion, wherein it is said:

"In an appropriate case there is a duty to set aside a verdict of guilty and to direct a verdict of not guilty by reason of insanity—a duty to be performed with caution, however, because of deference due to the jury in resolving factual issues. While the issue of criminal responsibility of a defendant suffering from a mental disease is not an issue of fact in the same sense as the commission of the offense, Holloway v U.S. 80 US App. D.C. 3, 148 F 2d 665,666, still it is an issue of fact. Both Holloway and Durham v U.S. 94 US App DC 228, 214 F 2d 862, 45 A.L.R 2d 1430, discuss in some detail the nature of the issue and the criteria the jury is to use in resolving it.

"In Durham we defined the issue itself to be whether or not the alleged conduct is "the product of mental disease or defect," whether the accused acted because of a mental disorder." Id. 94 US App DC at pages 241,242, 214 F 2d at pages 875, 876"

> At this point a footnote pointed out —"It is to be kept in mind there need be only a reasonable doubt about it to entitle the accused to an acquittal-see Davis v U.S., supra

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Further on, in the Durham case, supra, the opinion reads:

"The evidence affords no legal support for a finding beyond a reasonable doubt that the mental disease did not cause the indicted conduct, therefore the District Court erred in not directing a verdict of not guilty by reason of insanity."

In the instant case, the Government produced no expert testimony or expert witnesses to controvert Dr. Klein's testimony although they could have had Robinson examined at that time or anytime before then, since it was common knowledge around the Court house that Robinson's defense was going to be insanity and self-defense. All they did, attempted to do, and evidently did succeed, was to discredit the medical testimony and put on a show for the jury but blotting out the true facts. True, there was non-expert testimony, but this, cut both ways at least as deeply in the direction of sanity as well as insanity.

Your appellant prays that this Honorable Court's judicial conclusion be that as a factual matter as reasonable doubt was created by the medical testimony coupled with opinion adduced thereto that it should not be charged by lay witnesses who testified as to Everit Robinson's conduct during and shortly after the alleged offense took place. And further, as this Court said in the Durham case, " A jury may not be upheld in arbitrarily convicting of crime." So says the appellant here and now and prays that the verdict be set aside and that prays that this Honorable Court free him of the alleged offense because of his condition at the time of the offense.

Without being in doubt, your appellant feels that for him to be denied his freedom, this Court ought to be able to say that the result is rationally consistent with the evidence, measured by the required degree of proof. Can it say that in Everit Robinson's case. We say, NO!

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Your appellant asks this Court to state that it is unable to say that the jury was warranted on the evidence in finding that it failed to entertain a reasonable doubt that except for a diseased mind or a diseased mental condition Robinson would have committed the offense he is charged with, that is, that this Court is unable to state that the jury was warranted in reaching an abiding conviction that the abnormal mental condition definitely ascertained as early as December 14, 1957, was not the cause or a cause without which the crime would not have occurred.

Your appellant asks further that even though this Honorable Court gives due deference to the verdicts of juries and to the denials of trial courts for new trials, that it decide and conclude that it would be inconsistent with applicable legal standards to hold on the record as presently constituted that punishment for criminal conduct, rather than the treatment for a mental disease was the remedy.

As this Court stated in the Holloway case:-

> Our collective conscience does not allow punishment where it cannot impose blame. 80 App DC 4,5, 148 F 2d, 666,667.

The Court below erred on the point of instructing the jury regarding the defense of insanity and its instruction was so wrong and abstract to such a degree that it constitutes ground for reversal.

In the charge to the jury, the trial court stated (R-627)-

" You are also instructed that insanity arising during the progress of a crime voluntarily brought on by a defendant, and as a result of a blow inflicted by his adversary in defending himself, will not excuse the defendant for his subsequent conduct in the affray."

This, your appellant contends, is not the law in the District of Columbia nor was the instruction the law in this jurisdiction.

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The Court below erred in not declaring a mistrial on account of the improper remarks made by the Government prosecutor in his opening statement and during the trial. The remarks were without foundation, made about events that never took place and several remarks made to belittle the competency of the witnesses, solely for the purpose of influencing the jury in an improper manner.

In the opening statement, the prosecutor on page 5 b of the record, inserts his own thinking....outloud,——"I suppose he (Smith) was going to take her home."

When in fact the testimony at the trial revealed that all Smith was doing was picking Barbara Hall up and letting her drop and threatening to slit her throat from ear to ear. None of the Government witnesses testified to anything different.

No continent (5-b)-Everit Robinson had this bumper jack, another defendant had the wrench.....

The testimony revealed that Everit Robinson had the jack and that before he could use it, he had been cut by Smith and Smith used the bumper jack on Everit Robinson long before Everit was able to get his hands on that jack to defend himself and strike back at Smith after being 'cutted' on the hand twice with the jack and after being cut and hit by Smith's fist.

On page 5-c, the prosecutor tells the jury that the defendants fled from the scene, quit many as quickly as possible.

Nowhere in the testimony is that statement proved.

As to the remarks made by the prosecutor to belittle Dr. Klein's testimony, your appellant calls to the attention of this Honorable Court those parts of the trial record already noted in this brief.

In his closing statement to the jury, the prosecutor commits so many breaches of good faith that it must be brought out here and now.

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He makes little of the conduct of Walter Smith, the deceased at the Tip Top Tavern, when just a week before this crime took place, Smith forced the proprietor of the Tavern to kill him after he had been thrown out for creating a commotion. (R-608)-but makes no attempt to deny that Herbert Hall and John Sewell testified as to Smith's bad conduct that night and that these three defendants saved him from certain death on that night.

The prosecutor makes light and ingnores the credibility of the expert witness, Dr. Klein, thusly:

(R-602) Now counsel went on to make some comment about Sgt. Donahue and said that Donahue talked with Travit Robinson 1-½ hours and so did Dr. Klein, and that Dr. Klein has much more experience so therefore you should believe Dr. Klein.

Now you recall Dr. Klein told you he did not see Travit Robinson until around March 18, I believe it was. I do not care whether Dr. Klein has been a psychiatrist or a physician for 33½ years or for 66 years. Just because he happens to be a doctor and just because he happens to have gone to medical school and has had some experience in his field, does not require you as people equally intelligent as Dr. Klein and gifted equally with common sense to accept anne theory he might give you. I do not care what background he has had. When he gives you an opinion , ladies and gentlemen, he has got to give you an opinion based on some type of a foundation. Now that type of an opinion could he give you as to what the defendant's mental condition was some three months before he saw them all he did was talk to him for an hour and a half and look at some notes on his desk....."

At this point, the Court erred in not declaring a mistrial not only because of the remarks made by the prosecutor but also because the prosecutor mis-stated the law.

The trial court was under a duty to know that plain errors and defects created by the prosecutor as noted herein and by the reading of the transcript would be noticed by this Court even if the defense did not bring it to the attention of the trial judge, and the trial court avoided this action by declaring the mistrial

or granting the motion for a directed verdict when it was made.

One must read the irresponsible tirade made against Dr. Klein by the prosecutor on page 603 of the transcript to fully comprehend that in this day and age, we have reached the point where a lawyer, who is not a physician or a psychiatrist, is able to tell a jury that the psychiatrist's examination and opinion of what he found when he interviewed and tested a patient, is not worth much, and then goes on to tell the jury what he would have done.

This is reversible error.

The court below erred in refusing to allow the defense to propound the defense that the appellant's rights were not protected and they were violated under Rule 5(b) of the Federal Rules of Criminal Procedure.

Sgt. Donahoe under cross examination stated (R-533)- after being asked why or what was his purpose of taking Everit Robinson to Police Headquarters between the hours of 3 a.m. and 8:10 a.m. he answered:-" Because he was under arrest. I inquired of him at the first opportunity after he had been brought there if he would give me a statement or tell me what happened so I could reduce it to writing, to typewritten form and he agreed."

Now we come to the important part of appellant's theory.

The next question was:- Did you advise him of his rights ?

Sgt Donahoe answered,- I advised him verbally and then after I typed up the statement, he re-read that statement that had been read by Mr. Flannery.

Mr. Stumpf, counsel for the defense asked Sgt. Donahoe to re-read that question.

At this point the Court interrupted timely:- It has already been read. Let us not go over this twice, the jury has already heard it. The only thing he did not say was that he had a right to have a lawyer, he did not tell him that.

Mr. Stempil:- He didn't tell him that ?

The Court:- No, he did not, that is the only one he didn't.

Mr. Flannery:- Your Honor, there is no law that says he has to tell them and I object.

The Court sustained the objection.

When the Court was queried if the defense could refer to rule 5(b) of the Fed. Rules of Criminal Procedure after the Court and sposte advised counsel before the jury that there was no question involving rule 5(a) of the rules referred to above, it followed up with,—"You cannot refer to Rule 5(b), it has nothing more to do with it than rule 5 (a)....."

Your appellant calls to this Honorable Court's attention that it was the purpose of the defense to advise the Court that under Rule 5(b) it was incumbent and the duty of the Commissioner and not the police officer to advise the accused of his rights, and that nowhere in the rules is that duty delegated to anyone else.

The rule specifically reads:-

Rule 5. Proceedings Before the Commissioner

(b)- STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him.

Appellant , through counsel, is unable to find in that rule, any deviation from the set words that give the commissioner and not the police officer, certain duties which protect the rights of the accused.

Any other act or statement made by the police officer in violation of this rule is bad law and should be reversed. Anything said by the defendant to the officer at police headquarters should have been kept out of the trial by the court and your

appellant prays this Honorable Court to take cognizance of Rule 52 (b) 18 USCA (Fed. Rules of Civil Procedure) and decide that plain errors or defects affecting the substantial rights will be noticed by this Court although they were not brought to the attention of the trial Court, although, as your appellant points out, the effort was made, but rebuked.

As a final, but important note to this appeal, your appellant refers this Honorable Court to the testimony of Robert Lee Evans-the Government's star witness--on page 174 stated in response to the question put to him by the prosecutor:

Q.- Who hit the first blow ? Do you know ?

A.- Truvit Robinson

(R-175) * * *Well at first the way I looked at it, at first they were fighting very well and then it looked to me the dead man got the best of them and took it from them the junk some do. The one in the middle (Truvit Robinson) right there, used the junk.***He hit the man on the side of the head with it.***While they were fighting for a while I saw the dead man get the junk from him, in some kind of way, and he hit the one on the end (Truvit Robinson.)

On cross examination (R-page 182)- Q.- Did you say Walter Smith hit Truvit Robinson on the head with the bumper junk ?

A.- With his fist, not the bumper junk.

Q.- Not the bumper junk ?

A.- Yes.

Q.- Who swung first ?

A.- The one in the middle sitting over there.(Truvit Robinson)

Q. What was he swinging with ?

A.- His fist.

Here is the Government's star witness who now testifies that Truvit Robinson started swinging and started swinging with his fist. Just before he testified that Robinson (Truvit) started with the bumper jack, and the prosecutor in his opening and closing

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statements forced the jury to believe that the first blow in the fight was struck by Truvit Robinson with the bumper jack.

On page 129-Evans makes Truvit Robinson's explanation of his conduct more explicit when he states that the two brothers were wrestling with the jack and that this wrestling took place after Truvit was hit on the head by Smith.

Does this not bear out the testimony of Kinkaney and Truvit Robinson as to that occurred after Truvit Robinson was hit on the head by Smith ?

Evans was questioned by Mr. Stumpil about what he said at the Coroner's inquest, just two days fr after the fight.

Q.- At the Coroner's inquest on page 37, I mind you, did you say that Smith was beating on these boys first and your answer was this: This guy swung Slim first and he was fighting them and it looked to me he was beating them ?

A.-Yes, I said that.

The Court interrupted the cross examination with: "That is not what he said."

(How could the Court know what he said when Mr. Stumpil was cross examining Evans on something he said at the Inquest and at the inquest where the trial judge was not present.)

After many other questions, Mr. Stumpil asked Evans (R-130)- that was he doing, protecting himself ? Evans answered by Stumpil reading from the Coroner's inquest transcript—— I would say he was defending himself. I (Stumpil) said, defending himself ? and you said, yeah. I(Stumpil) asked you, did you see any blood running off of him after he hit him and you said I wasn't that close to him but when I passed them I saw blood all over his face.

That testimony, the testimony of Evans indicates that he still is not sure of everything that transpired but that he was sure that Truvit Robinson was defending himself against the blows being rained upon him by Smith and that he was sure it was Truvit

who passed him and he recognized him because he had the blood on his face.

There is evidence of uncleanness as to who started the fight and all witnesses testified that at the beginning of the fight, all were using their fists, and that Smith was getting the best of it and that he used the junk first on Truvit, then on Travit and finally it was wrested from him and used by Travit to protect himself from further injury against Smith.

The circumstances surely indicate that Travit Robinson was not of sound mind when he was wielded the bumper jack.

For all of the reasons and statements made and the laws cited, your appellant prays this Honorable Court to [illegible] his conviction and remand this case for further proceedings not inconsistent with the law of this jurisdiction, namely that because of the Government's failure to sustain the burden in the instant case as far as the sanity question is concerned, that the appellant be granted a judgment of acquittal by reason of insanity.

And further, in the interest of justice, that the appeals of Henry Blakeney and Truvit Robinson (No._____for Blakeney and No.14509 for Truvit Robinson) be consolidated with this appeal No. 14510.

Respectfully submitted,

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I hereby certify that on August 25, 1958 I delivered a copy of this brief with all necessary parts to the District Attorney's Office at the US Court House.

I. William Stempil